SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: October 25, 2006
Decided: January 26, 2007

STATE OF DELAWARE	)	
	)	
v.	)	ID#: 0210011281
	)	
JAMAR A. WHITE,	)	
	)	
Defendant.	)	

ORDER

Upon Defendant's Second Motion for Postconviction Relief – *DENIED*

On June 2, 2003, Defendant pleaded guilty to several, serious, violent felonies. On August 29, 2003, he was sentenced to twelve years in prison, followed by probation. Defendant did not file a direct appeal concerning his plea, sentence, or anything leading to them.

On August 5, 2004, Defendant filed his first motion for postconviction

relief, which the court summarily dismissed under Superior Court Criminal Rule 61(d)(4). Again, Defendant did not file an appeal.

On August 15, 2006, Defendant filed this, his second motion for postconviction relief. As it did in 2004, under Superior Court Criminal Rule 61(d), the court preliminarily considered Defendant's motion. Although the motion appeared to be procedurally barred under Rule 61(i), and subject to summary dismissal under Rule 61(d)(4), the court ordered the attorney general to respond under Rule 61(f). Regrettably, that caution is necessary to reduce the risk that on appeal, the attorney general will not support a favorable ruling.[1] The attorney general responded on September 28, 2006. In this case, the State contends that Defendant is not entitled to relief.

Defendant filed a Rule 61(f)(3) reply on October 25, 2006, contending: his Fifth Amendment right against double jeopardy was violated, the indictment was "erroneous," and his Sixth Amendment right to effective assistance of counsel was

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[1] *See, e.g., Webb v. State*, Del. Supr., No. 183, 2005, Per Curiam (November 28, 2005) (ORDER) (Attorney General refuses to argue violation of Rule 61(d)(1) is harmless where motion filed seven years after conviction, and Rule 61(i)(1) bar obviously applicable); *Floyd v. State*, Del. Supr., No. 337, 2006, Ridgely, J. (Aug. 23, 2006) (Attorney General refuses to argue that the court may correct untimely appeal problem through Rule 61, notwithstanding *Middlebrook v. State*, 815 A.2d 739, 743 (Del. 2003)).

also violated. Not only is Defendant's second motion procedurally barred under Rule 61(i)(3), it is further barred as repetitive under Rule 61(i)(2).

I.

Defendant's arguments to the contrary notwithstanding, his second motion for postconviction relief, in effect, merely requests reargument of the motion denied in 2004. Defendant raises essentially the same claims, insisting that "the concepts initially asserted were clearly misunderstood by the [c]ourt."

Specifically, in his 2004 motion, Defendant raised seven grounds for relief. Ground Three was "Jury indictment violated double jeopardy for Robbery and PFDC." Ground Four concerned "Counsel's failure to contact defendant and file motions." Ground Five alleged "Counsel's apathy in significance of preliminary process damaged infancy of case."

In his pending motion, Defendant raises three grounds for relief. Ground One is "FIFTH AMENDMENT RIGHT PRECLUDING DOUBLE JEOPARDY VIOLATED." Ground Three is "SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BY COUNSEL'S DEFICIENT PERFORMANCE."[2] Hence, the court concludes that Defendant is simply trying to reargue part of his

[2] Ground Two is discussed below.

2004 motion.

As the December 6, 2004 Order (reissued on May 4, 2005) says and as mentioned above, Defendant's first motion for postconviction relief was summarily dismissed because it was procedurally barred under Rule 61(i)(3). The court discussed the merits of Defendant's motion in 2004 as a "courtesy" to Defendant. In any event, Defendant did not ask for reargument of the dismissal. Nor did he file an appeal from the dismissal. Thus, it no longer matters whether, as Defendant now alleges, the court "clearly misunderstood" Defendant's claims in 2004. Defendant was obligated to ask for reargument then or file an appeal. He did neither. Now, it is too late.

II.

To avoid Rule 61(i)'s procedural bars, Defendant argues that he did not challenge the indictment, his current Ground Two claim, in 2004 "due to insufficient assistance of counsel, inadequate legal documentation pertaining to this case, thus leading to a meager examination of this case's evidence . . . ." That explanation is conclusory, and it does not establish cause for relief from the 2004 procedural

default.[3]

Defendant filed his first motion fourteen months after he pleaded guilty and almost a year after he was sentenced. He filed this motion twenty months after his first one was dismissed and a few days short of three years after his conviction became final.[4] Moreover, as the court explained, orally and in writing, by pleading guilty, Defendant was giving up his right to appeal his conviction. That included his right to challenge the indictment.

The two robbery counts that Defendant pleaded guilty to each charged him with taking money from a different person and threatening each of them at gun point. While all the money Defendant took may have belonged to someone else, the bank, some of the bank's money was in each teller's possession, and Defendant did not have permission from either the bank or the tellers to take the money. And, but for Defendant's threats, neither teller would have let Defendant take money out of the cash drawer for which she was responsible. That raises the second part of Rule

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[3] Super. Ct. Crim. R. 61(i)(3)(A).

[4] Under former Rule 61(i)(1), which applies here, Defendant had three years in which to file. Thus, his second motion is not time-barred.

61(i)(3), prejudice from violation of Defendant's rights.[5]

Defendant has not alleged, much less demonstrated, prejudice to his rights stemming from his failure to challenge the indictment sooner. Defendant was caught shortly after the robberies, and the evidence, direct and circumstantial, was overwhelming. When he pleaded guilty, Defendant admitted that he was guilty. Had Defendant stood on his rights and gone to trial on June 2, 2003, instead of pleading guilty that day, he would now be serving at least twenty years in prison, probably much more. If Defendant had challenged the indictment in 2004 and prevailed, which would have been a miracle, he would have been resentenced for a consolidated robbery and a consolidated firearm charge, each involving his terrorizing five people at gunpoint. Thus, he still would have faced forty years in prison. And, based on his record, which includes a prior armed robbery at an ATM as a juvenile, he would have received a similar sentence to the one he is serving.

As to Defendant's procedural defaults concerning his Ground One and Ground Three claims, Defendant alleges "there was a miscarriage of justice which undermined the legality, integrity, and fairness leading to the judgment of conviction in this case," which almost parrots Rule 61(i)(5). Again, Defendant's allegation is

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[5] Super. Ct. Crim. R. 61(i)(3)(B).

conclusory. It takes more than a bare allegation to invoke Rule 61(i)(5).[6]

Moreover, as explained above and below, Defendant was admittedly guilty of the crimes he pleaded guilty to, and the State had more than enough evidence to prove it. As bad as Defendant's sentence is, it could have been much worse, and it still would not have amounted to a miscarriage of justice. In reality, Defendant robbed five innocent people at gunpoint.

III.

Again as a courtesy, the court assures Defendant that there was no misunderstanding about his double jeopardy claim. As matter of law, if during the course of robbing a single bank, the robber takes money from five tellers at gunpoint, he is committing five counts of robbery first degree.[7] By the same token, if the robber is actually armed with a firearm during the robberies, he is also guilty of five counts of possession of a firearm during the commission of a felony. And, he can lawfully be indicted, convicted and sentenced for all ten counts.

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[6] *Corkran v. State,* Del. Supr., No. 452,1991, Walsh, J. (February 7, 1992). *See also State v. Butler*, 1989 WL 100490, at *1 (Del. Super.).

[7] *Harrigan v. State*, 447 A.2d 1191, 1192 (Del. 1982) (citing *McCoy v. State*, 361 A.2d 241, 242-43 (Del. 1976)).

It does not matter that defendant took the money during a single bank robbery. Nor does it matter that the money belonged to a single owner, the bank.[8] The cases cited by Defendant actually support the State's position. *Washington v. State* upheld Washington's convictions for robbing the same victim twice in less than a minute.[9] Similarly, *Spencer v. State* upheld Spencer's convictions for shooting the same victim twice.[10] Defendant's argument here is actually weaker than the arguments rejected in *Washington* and *Spencer,* because Defendant robbed different victims.

Perhaps Defendant does not grasp his predicament because he does not see his victims as individuals. But, that is how the law sees them. As Defendant went from teller station to teller station in the bank, bellowing and brandishing a .45 caliber semi-automatic pistol, Defendant threatened each teller. To those innocent, terrified people, this was not just a bank robbery. For each of them, starring at a large caliber handgun while Defendant yelled at them, was an intensely personal,

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[8] *Reader v. State,* 349 A.2d 745, 747 (Del. 1975). *See also* 11 *Del. C.* § 831(a)(2).

[9] 836 A.2d 485, 488-89 (Del. 2003).

[10] 868 A.2d 821, 824-25 (Del. 2005).

life-or-death moment. Each of Defendant's victims must now live her life with the traumatic memories left by Defendant. And so, Defendant is not in prison for a bank robbery. Defendant is there for what he did to two individuals who simply had the misfortune to cross paths with him on October 17, 2002. That is why Defendant's guilty plea and sentencing do not offend the Constitutional protection against Double Jeopardy.

IV.

For the foregoing reasons, and as presented in the December 6, 2004 Order, Defendant's second motion for postconviction relief is ***DENIED.***

IT IS SO ORDERED.

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Judge

oc: Prothonotary (Criminal Division)
pc: Martin B. O'Connor, Deputy Attorney General
Michael C. Heyden, Esquire
Jamar A. White, DCC